Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

COY PHELPS,

Petitioner,

v.

MARILYN PATEL, JEFFERY BORNSTEIN, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

COY PHELPS 78872-011
Pro Se
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Dated: June 9, 2006

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

Whether, under the exception rule, a federal judge and a federal prosecutor can escape civil and criminal liability when they conspire with others to maliciously cause the warrantless arrest and prosecution of a citizen solely because the citizen exercised his first amendment right to express his Christian religious beliefs, political views, and philosophical ideologies, as related to the scripture of the Christian Holy Bible, on the Internet.

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There are no published opinions.

JURISDICTION AND AUTHORITY

The U.S. District Court had jurisdiction under *Biven v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999 (1971), 28 U.S.C. § 1331, 28 U.S.C. § 1343, and 42 U.S.C. § 1988.

The Ninth Circuit U.S. Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

This court has jurisdiction under 28 U.S.C. § 2101 and Rule 14 of the Supreme Court Rules.

The U.S. District Court Rulings; Order of Dismissal is attached as Appendix A (A. 1a); the U.S. District Court Order Granting Defendant's Motion to Dismiss is attached as Appendix B (A. 13a); the U.S. District Court Judgment and Order is attached as Appendix C (A. 17a); the decision of the Ninth Circuit is attached as Appendix D (A. 18a); and the Judgment of the Ninth Circuit is attached as Appendix E (A. 20a).

STATEMENT OF THE ISSUES

This case is about the violation of the First, Fourth, Fifth and Sixth Amendments to the U.S. Constitution.

A federal judge and a federal prosecutor conspired with others to deprive the Petitioner of his First Amendment right to express his sincerely held shared religious beliefs, political views, and philosophical ideologies on the Internet.

The Judge and the prosecutor maliciously caused the arrest, prosecution, and imprisonment of the Petitioner solely because of his religion, politics, and philosophy.

The arrest was warrantless and without probable cause.

The Petitioner was deprived of due process and a fair trial.

STATEMENT OF THE CASE

1. On March 26, 2001, the Petitioner was arrested by two unidentified U.S. Marshals as he was sitting quietly in a federal building talking to his attorney regarding another civil matter.

2. The U.S. Marshals did not possess a warrant of arrest and did not know why they were arresting the Petitioner.

3. The Petitioner was taken before U.S. Magistrate Judge Zimmerman who examined the warrant and affidavit of probable cause and stated "There's nothing in this paperwork to tell me why this man is in my court."

4. The warrant was a blank form with no information written in the blank spaces. There was no date, no names, no signature, and no other information. It was blank.

5. The affidavit to support probable cause merely stated "See attachment."

6. The "attachment" did not state a charge and did not reveal any information that a crime had been committed. The attachment was several pages of

paper printed from the internet which revealed Christian religious writings.

7. The Assistant U.S. Attorney admitted that the Petitioner

(a) Did not commit a crime,

(b) Did not violate any laws,

(c) Did not violate any kind of court order,

(d) Did not violate any kind of probation condition,

(e) Did not conspire with anyone to commit a crime,

(f) Did not associate with anyone engaged in criminal activity, and

(g) Did not possess anything unlawful.

8. The Magistrate Judge refused to arraign the Petitioner, but, instead of dismissing the charges, he sent the case to the judge who ordered the arrest of the Petitioner.

9. Judge Marilyn Patel accused the Petitioner of publishing Christian religious teachings on the internet without obtaining prior government approval, but, did not arraign the Petitioner.

10. The Petitioner was not charged, no bill of particulars were presented, no bail hearing was conducted, and the Petitioner was held without bail and was taken to the county jail to await disposition of the case.

11. Approximately thirty days later, while in jail, the Petitioner received a copy of a letter that a U.S. Probation officer had written to Judge Patel in response to her letter to him ordering him to

investigate the Petitioner, thoroughly, to discover some evidence of criminal activity which she could use to make the arrest lawful by expost facto application.

12. The Probation officer reported that he had diligently investigated the Petitioner but was unable to discovery any unlawful activity.

13. A hearing was convened and it was obvious that the judge had used the content of the religious writings as the merits of the case; and had used the merits of the case to establish probable cause for the unreasonable arrest.

14. The Petitioner filed several motions, including a motion for recusal, because of the judges' deep seated antagonism toward the Petitioner and his religion. The motions were denied and the denial upheld by the 9th Circuit without comment.

15. The Petitioner challenged the arrest and the charge of attempting to publish Christian religious literature on the Internet. Judge Patel, and the prosecutor, repeatedly changed the charges each time the Petitioner challenged the charge.

16. The court finally held a hearing, after a year of incarceration in the county jail, and the Petitioner prevailed over the arrest and charges, but the judge sent the Petitioner to prison anyway saying that his sincerely held shared religious beliefs was clear evidence of dangerousness.

WHY THIS PETITION SHOULD BE GRANTED

The Exception Rule:

The exception rule to judicial immunity has been stated by the U.S. Supreme Court in numerous cases.[1] The rule, simply stated, holds that judges enjoy absolute immunity from lawsuits when they are performing judicial acts commensurate with their authorized functions EXCEPT judges have no immunity whenever they

1. Act in clear absence of all jurisdiction, or

2. Base their decisions upon immutable standards such as race, gender, color, national origin, disabilities, or some other immutable factor, or

3. Base their decisions upon arbitrary classifications, or

4. Base their decisions to arrest and prosecute a person because that person exercised a protected Constitutional, statutory, Civil, or Common Law right;

Some courts have extended the exception to include

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[1] *Wilkes* v. *Dinsman*, 48 U.S. 89 (1849); *Randall* v. *Brigham*, 74 U.S. 523 (1868); *Bradley* v. *Fisher*, 80 U.S. 335 (1871); *Spaulding* v. *Vilas*, 161 U.S. 483 (1896); *Alzua* v. *Johnson*, 231 U.S. 106 (1913); *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Osher* v. *Littleton*, 414 U.S. 488 (1974); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Stump* v. *Sparkman*, 435 U.S. 349 (1978); *Butz* v. *Economou*, 438 U.S. 478 (1978); *Ferri* v. *Ackerman*, 444 U.S. 193 (1979); *Supreme Court of Virginia* v. *Consumers Union of U.S.*, 446 U.S. 719 (1980); *Dennis* v. *Sparks*, 449 U.S. 24 (1980); *Briscoe* v. *LaHue*, 460 U.S. 325 (1983); *Pulliam* v. *Allen*, 466 U.S. 522 (1984); *Cleavinger* v. *Saxner*, 474 U.S. 193 (1985); *Mireles* v. *Waco*, 502 U.S. 9 (1991); *Clinton* v. *Jones*, 520 U.S. 681 (1997).

5. Act without probable cause or when they act unlawfully.[2]

When a judicial officer acts within the exception rule to cause a malicious arrest, prosecution, and imprisonment without probable cause, that official is liable for damages (*Pierson* v. *Ray*, 352 F.2d 213, 217 (5th Cir. 1965), *affirmed in Pierson* v. *Ray*, 386 U.S. 547 (1967); *Agnew* v. *Moody*, 330 F.2d 868, 870 (9th Cir. 1964); *see United States* v. *Moody*, 778 F.2d 1380, 1386 (9th Cir. 1985)(Judge has no immunity when acting in clear absence of all jurisdiction or when basing a decision upon some impermissible ground such as race, religion, or the exercise of a constitutional right;) *United States* v. *Redondo-Lemos*, 955 F.2d 1296, 1301 (9th Cir. 1992)(Purposeful actions based upon race, religion, sex, or similar characteristics, are actionable.)

This Petitioner published a Christian religious website on the internet to proselytize his religious beliefs and to show how current events are related to the scripture of the Christian Holy Bible and to the political mood of the world.

The website was, without question, religious. It stated "This is a Christian religious website. If you are offended by Christian teachings, comments, or opinions, exit now." Noone could see the literature by accident.

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[2] *The Marshalsea*, 10 Coke 68; *Floyd* v. *Barker*, 77 Eng. Rep. 1305 (1607); *King* v. *Skinner*, 530 KB 1772; *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985); *Wayte* v. *United States*, 470 U.S. 598 (1985); *Burns* v. *Reed*, 500 U.S. 478 (1991); *Powers* v. *Ohio*, 499 U.S. 400 (1991); *Buckley* v. *Fitzsimmons*, 509 U.S. 259 (1993); *United States* v. *Armstrong*, 517 U.S. 456 (1996); *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999); *Kalina* v. *Fletcher*, 522 U.S. 118 (1997).

When Judge Patel and Prosecutor Bornstein learned of the website, they caused this Petitioner to be arrested, prosecuted and imprisoned solely because of the religious content of the website.

CONCLUSION

The Petitioner was exercising his First Amendment constitutional right to publish on the internet. *See Reno* v. *ACLU*, 521 U.S. 844 (1997)(Every citizen has the absolute right to publish on the Internet.) For the reasons stated above, this Petition should be granted.

Respectfully submitted,

/s/ COY PHELPS
COY PHELPS 78872-011
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CERTIFICATION

I, Coy Phelps, certify under penalty of perjury, pursuant to 28 U.S.C. § 1746, that I am the Petitioner in this action and that all the statements made herein were made by me and that all the statements are true and correct according to my best knowledge and belief.

/s/ COY PHELPS
COY PHELPS 78872-011
In Pro Se

Dated: June 9, 2006

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APPENDIX A

FILED
MAR 20 2003
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

COY PHELPS,	)	No. C 02-2504 PJH (PR)
	)	
Plaintiff,	)	RULINGS; ORDER OF
	)	DISMISSAL
vs.	)	
	)	(Docs 6, 8, 10, 19, 21; 22
MARILYN PATEL, et al.,	)	& 23)
	)	
Defendants.	)	
	)	

This is a civil rights case filed pro se by a state prisoner. Plaintiff asserts that defendants, who are the Chief Judge of this district, an Assistant United States Attorney, the United States Attorney, and two probation officers, acted against him because of his racial and religious beliefs. Defendants have filed a motion to dismiss, and plaintiff has also filed several motions.

1. Plaintiff's motions

a. Motions for appointment of counsel

Plaintiff has filed motions for appointment of counsel. There is no constitutional right to counsel in a civil case. Lassiter v. Dep't of Social Services, 452

U.S. 18, 25 (1981). 28 U.S.C. § 1915 confers on a district court only the power to "request" that counsel represent a litigant who is proceeding in forma pauperis. 28 U.S.C. § 1915(e)(1). This does not give the courts the power to make "coercive appointments of counsel." Mallard v. United States Dist. Court, 490 U.S. 296, 310 (1989).

The court may ask counsel to represent an indigent litigant under § 1915 only in "exceptional circumstances," the determination of which requires an evaluation of both (1) the likelihood of success on the merits and (2) the ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal issues involved. Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986).

Plaintiff has been very articulate in explaining and pursuing his claims. Although they may seem fairly complex, he appears to be capable of presenting them. The motions for appointment of counsel (docs 10 & 21) will be denied.

b. Plaintiff's other motions

Plaintiff's motion to amend the complaint to provide the names of the previously-unknown defendants (doc 8) will be granted.

Plaintiff has filed two motions "for change of venue." He asserts that because one of the defendants is the Chief Judge of this district, the undersigned could not be impartial. Treating these as motions for recusal, plaintiff (1) has not provided a timely and sufficient affidavit which would support recusal under 28 U.S.C. § 144, nor (2) has he provided sufficient grounds for doubting the impartiality of the undersigned under 28 U.S.C. § 455. See United States v. Zagari, 419 F. Supp. 494, 506 n.30 (N.D. Cal. 1976)(substantial

burden on movant because federal judge is presumed to be impartial). The motions (docs 19 & 22) will be denied.

Plaintiff has also moved to stay proceedings. He contends that this case should be stayed pending an appellate determination as to the propriety of the removal from state court of C 02-4740 PJH (PR), Phelps v. County of Alameda, a case which has been related to this one. The issue of whether removal was proper, which plaintiff has attempted to appeal in C 02-4740 PJH (PR), has no bearing on the issues in this case. The motion for stay (doc 23) will be denied.

2. Motion to dismiss

A. Standard

"'[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Terracom v. Valley National Bank, 49 F.3d 555, 558 (9th Cir. 1995)(quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Review is limited to the contents of the complaint, Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994), including documents physically attached to the complaint or documents the complaint necessarily relies on and whose authenticity is not contested. Lee v. County of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001). In addition, the court may take judicial notice of facts that are not subject to reasonable dispute. Id. at 688 (discussing Fed. R. Evid. 201(b)). Allegations of fact in the complaint must be taken as true and construed in the light most favorable to the non-moving party. Spreewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). Pro se pleadings must be construed liberally on a defendant's motion to dismiss for failure to state

a claim. Ortez v. Washington County Oregon, 88 F.3d 804, 807 (9th Cir. 1996).

B. Analysis

a. Immunity of Judge Patel

In 1986 plaintiff was found not guilty by reason of insanity on federal charges of placing pipe bombs at the Black Studies Department of San Francisco State University, a synagogue, and synagogue school, the house of a rabbi, and the Humanist Party office. United States v. Phelps, 283 F.3d 1176, 1178, 1178 n.2 (9th Cir. 2002). He was committed to a federal hospital for treatment. Id. 1179. In 1998 the court granted plaintiff conditional release; the conditions were modified three times, the last modification occurring on January 30, 2001. Id. at 1180. In March of 2002, Phelps' appeal challenging the imposition of conditions upon his release was rejected by the court of appeals on grounds he should not have been released at all, proper procedures not having been followed. Id. at 1184. The court also determined in dictum that the conditions imposed by Judge Patel would have been proper under the statute if concurred in by the director of the institution at which he was hospitalized. Id. at 1187.

Plaintiff claims that in 2001 Judge Patel, motivated by dislike of his racial and religious beliefs, conspired with an Assistant United States Attorney and a probation officer to issue an arrest warrant without probable cause. This warrant charged him with violating conditions of his release from federal confinement. He was brought before Judge Patel, who allegedly did not tell him the nature of allegations against him or what he was charged with. He was held without bail. Judge Patel allegedly refused to consider plaintiff's request to remove his appointed attorney, and would not rule upon the ten habeas

corpus petitions plaintiff filed pro se. Plaintiff alleges that she denied all his "motions and actions" because of bias against him. In court, Judge Patel allegedly questioned a psychiatrist appointed to examine plaintiff with leading questions and persuaded him to answer in a manner harmful to plaintiff. He asserts that he was recommitted pursuant to 18 U.S.C. § 4243(f), which he contends does not apply to those who have already been released. He also asserts that Judge Patel committed him to a federal prison, when the statute provides only for commitment to the custody of the Attorney General, and that when plaintiff filed a notice of appeal Judge Patel intervened and ordered the clerk to return his fees, stopping the appeal.

Federal judges are absolutely immune from civil liability for acts performed in their judicial capacity and, unlike the judicial immunity available to state judges sued under § 1983, a federal judge's immunity is not limited to immunity from damages, but extends to actions for declaratory, injunctive and other equitable relief. Moore v. Brewster, 96 F.3d 1240, 1243 (9th Cir. 1996); Mullis v. U.S. Bankruptcy Court, 828 F.2d 1385, 1394 (9th Cir. 1987)(applying judicial immunity to actions under Bivens), cert. denied, 486 U.S. 1040 (1988). This is because if a federal judge violates a litigant's constitutional rights in a proceeding pending in federal court, Congress has provided carefully structured procedures for taking appeals and for petitioning for extraordinary writs in Title 28 of the United States Code. Id.

Whether an act by a judge is a judicial one relates to (1) the nature and function of the act and not the act itself, i.e., whether it is a function normally performed by a judge, and to (2) the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity. Mireles v. Waco, 502 U.S. 9, 11-13 (1991)(judge's direction to court officers to forcibly

bring person before him is function normally performed by judge and taken in aid of judge's jurisdiction over matter before him); see also Atkinson-Baker & Assocs., Inc. v. Kolts, 7 F.3d 1452 (9th Cir. 1993)(judge absolutely immune for decision to bar court reporter from continuing to provide services in case over which judge served as special master since said decision was judicial act). Other factors in determining whether a particular act is judicial include whether: (1) the events occurred in the judge's chambers, (2) the controversy centered on a case then pending before the judge, and (3) whether the events arose directly and immediately out of a confrontation with the judge in his or her official capacity. Duvall v. County of Kitsap, 260 F.3d 1124, 1133 (9th Cir. 2001).

Taking the above factors into consideration, it is clear that Judge Patel was acting in a judicial capacity when she allegedly performed the acts which plaintiff contends violated his rights.

Plaintiff, perhaps anticipating the judicial immunity issue, alleges repeatedly that Judge Patel acted spitefully out of dislike of his political and religious beliefs. This does not suffice to negate judicial immunity, however: As long as a judge has jurisdiction to perform the "general act" in question, he or she is immune, however erroneous the act may have been, however injurious the consequences of the act may have been, and irrespective of the judge's claimed motivation. Harvey v. Waldron, 210 F.3d 1008, 1012 (9th Cir. 2000). Plaintiff also alleges that Judge Patel conspired with other federal employees, but this also does not negate judicial immunity. Moore v. Brewster, 96 F.3d 1240, 1243-44 (9th Cir. 1996); Ashelman v. Pope, 793 F.2d 1072, 1078 (9th Cir. 1986)(en banc). Finally, plaintiff alleges that congress has made judges law enforcement officers; he apparently believes this negates judicial immunity.

This also is incorrect: The issue is not the person's title, but the function she performs. In this case it is clear that Judge Patel was performing judicial functions, and is entitled to judicial immunity. The motion to dismiss will be granted as to Judge Patel. Because plaintiff has amended once after the motion to dismiss, and has provided extraordinarily lengthy allegations in the complaint and in the opposition, none of which suffice to state a claim, further amendment would be futile. The dismissal will be without further leave to amend.

b. Immunity of Assistant United States Attorney Jeffrey Bornstein

Prosecutor Bornstein is alleged to have conspired with the other defendants, including Judge Patel, to impose improper conditions upon plaintiff's release, to rehospitalize him on the basis of his religious and political beliefs, and to have pursued that goal in court. Plaintiff has failed to state a conspiracy claim because he has not alleged specific facts. See Johnson v. California, 207 F.3d 650, 655 (9th Cir. 2000)(quoting Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 626 (9th Cir. 1988))("'A mere allegation of conspiracy without factual specificity is insufficient.'")(claims under 42 U.S.C. § 1985(3)). The remaining claims against Bornstein, being based on prosecutorial functions performed by him, are barred by prosecutorial immunity. See Buckley v. Fitzsimmons, 509 U.S. 259, 272-73 (1993). As with the claim against Judge Patel, plaintiff has provided lengthy discussions of the factual basis for his claims, leading the court to conclude that further amendment would be futile. The dismissal will be without further leave to amend.

c. Probation officer Pamela D. Patterson

In his amended complaint plaintiff alleges that probation officer Patterson conspired with the other defendants to secure an arrest warrant for him, and then testified in court that he had not violated any law or specific condition of probation. Plaintiff has failed to state a claim that she conspired to violate his constitutional rights for the reason discussed above.

Patterson contends that she has quasi-judicial immunity from these claims. The Ninth Circuit had held that probation officers possess an absolute judicial immunity from damage suits under § 1983 when they carry out official functions bearing a close association to the judicial process. Demoran v. Witt, 781 F.2d 155, 156-58 (9th Cir. 1985)(immunity for preparing reports for use by state courts).

In this case, the remaining claim against Patterson is that she secured an arrest warrant for him, then admitted before Magistrate Judge Zimmerman that he had not violated any law or condition of release. The testimony obviously was not a violation of plaintiff's rights, and in obtaining the arrest warrant she clearly was performing an act intimately related to the judicial function. She therefore is entitled to quasi-judicial immunity. Patterson's motion to dismiss will be granted. For the reasons set out above, the dismissal will be without further leave to amend.

d. Unknown U.S. Attorney and Chief Probation Officer Aamundstad

These defendants assert that they are named in their official capacities and thus are entitled to the sovereign immunity accorded to the United States. A Bivens action such as this one "can be maintained against a defendant in his or her individual capacity only, and not in his or her official capacity." Daly-

Murphy v. Winston, 837 F.2d 348, 355 (9th Cir. 1988). The court is unable to find an allegation in the complaint that these defendants are sued only in their official capacities, and, as plaintiff points out in his opposition, he specifically states on page four of the complaint that he is suing the defendants in their individual capacities. In any event, even if he had not specified, the Ninth Circuit has held that a suit under § 1983 against state actors necessarily implies a suit against the defendants in their personal capacities. Cerrato v. San Francisco Community College Dist., 26 F.3d 968, 973 n.16 (9th Cir. 1994); see also Charfouros v. Board of Elections, 249 F.3d 941, 956-57 (9th Cir. 2001)(liberally construing ambiguous complaint to allege claims against board members in their individual capacities). Because it is likely that the Ninth Circuit would construe a Bivens claim in the same way, see Martin v. Sias, 88 F.3d 774, 775 (9th Cir. 1996)(§ 1983 actions and Bivens actions are identical, except that defendants are federal actors), this argument will be rejected.

However, the court will review this claim pursuant to 28 U.S.C. § 1915A(b). Bivens liability requires proof of direct personal responsibility. Pellegrino v. United States, 73 F.3d 934, 936 (9th Cir. 1996). A theory of respondent superior is not applicable in a Bivens action. Id.; Terrell v. Brewer, 935 F.2d 1015, 1018 (9th Cir. 1991). Plaintiff's allegations against these defendants are clearly respondeat superior claims, and thus will be dismissed.

The dismissal will be with leave to amend. If plaintiff chooses to amend, he must plead facts to state a non-respondeat superior claim against these defendants under the following standard: A supervisor may be liable only upon a showing of (1) personal involvement in the constitutional deprivation or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional

violation. Redman v. County of San Diego, 942 F.2d 1435, 1446 (9th Cir. 1991)(en banc)(citation omitted). A supervisor therefore generally "is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Evidence that a supervisor implemented "a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation" may suffice. Redman, 942 F.2d at 1446; see, e.g., Dubner v. City & County of San Francisco, 266 F.3d 959, 968 (9th Cir. 2001)(chief of police may be held liable in his individual capacity on unlawful arrest claim where there was evidence that (1) it was common practice in police department to use citizen's arrest forms without specifying who should be arrested and for what violation, (2) officers were trained to use the citizen's arrest forms in this way and (3) it was common knowledge that the forms were used in this way). But cf. Mackinney v. Nielsen, 69 F.3d 1002, 1008 (9th Cir. 1995)(allegation that supervisor failed to prevent mistreatment by police officers even though he knew that individual had complained about past similar mistreatment by police did not suffice to show policy that was repudiation of constitutional rights).

(d) Collateral estoppel

Defendants allege, as a basis for their motion to dismiss applicable to all defendants, that plaintiff's claims are barred by collateral estoppel. They contend that the decision of the United States Court of Appeal in United States v. Phelps, 283 F.3d 1176 (9th Cir. 2002), is preclusive. In that case the court held that Phelps should not have been released at all. Id. at 1184. Defendants' contention is that because he should not have been released, his arrest and rehospitalization could not have damaged him.

The federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. Allen v. McCurry, 449 U.S. 90, 94 (1980). Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. Montana v. United States, 440 U.S. 147, 153 (1979). Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. Id. Res judicata is sometimes referred to as "claim preclusion," and collateral estoppel as "issue preclusion." Allen v. McCurry, 449 U.S. at 94 n.5.

Although it may be that issue preclusion would bar plaintiff from recovering damages for his rehospitalization if he were to prevail, he might be entitled to nominal damages. This means that plaintiff could establish damages without relying on his rehospitalization as a basis. This ground for defendants' motion to dismiss is rejected.

CONCLUSION

1. Plaintiff's motions for appointment of counsel (docs 10 & 21), for change of venue (docs 19 & 22), and to stay the case (doc 23) are DENIED. His motion for leave to amend (doc 8) is GRANTED. The clerk shall file the amended complaint.

2. The motion to dismiss (doc 6) is GRANTED. Plaintiff's claims against defendants Patel, Bornstein, and Patterson are DISMISSED with prejudice. Plaintiff's claims against defendants Unknown U.S. Attorney and Chief Probation Officer Aamundstad are DISMISSED with leave to amend. If plaintiff chooses to amend, he must do so within thirty days of the date

this order is entered. Any amendment should substitute the name of the United States Attorney.

IT IS SO ORDERED.

DATED: March 19, 2003.

/s/ PHYLLIS J. HAMILTON
PHYLLIS J. HAMILTON
United States District Judge

APPENDIX B

FILED
MAR 08 2005
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

COY PHELPS,	)	No. C 02-2504 PJH (PR)
	)	
Plaintiff,	)	ORDER GRANTING
	)	DEFENDANTS' MOTION
vs.	)	TO DISMISS
	)	
MARILYN PATEL, et al.,	)	(Doc 39)
	)	
Defendants.	)	
	)	

This is a civil rights case under Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), filed pro se by an inmate at a federal institution in North Carolina. The court dismissed claims against three defendants without leave to amend and claims against the other two defendants with leave to amend. Plaintiff has amended, and the remaining two defendants have moved to dismiss. Plaintiff has opposed the motion and defendants have filed a reply. The motion is submitted.

BACKGROUND

Plaintiff's claim was that defendants, who were the Chief Judge of this district, an Assistant United State Attorney, the United States Attorney, and two probation officers, persecuted him because of his race and Christian religious beliefs. The court dismissed

the claims against Judge Patel, AUSA Bornstein, and Probation Officer Patterson. It dismissed with leave to amend the claims against Chief Probation Officer Aamundstad and the unknown United States Attorney because the claims against them were clearly based on a respondeat theory, which the court concluded is not an available theory of recovery in a Bivens action such as this one. Plaintiff was allowed to amend to allege liability of these defendants on a basis other than respondeat superior, and was told to provide the name of the United States Attorney defendant. He has amended.

DISCUSSION

A. Standard

"'[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Terracom v. Valley National Bank, 49 F.3d 555, 558 (9th Cir. 1995)(quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Review is limited to the contents of the complaint, Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994), including documents physically attached to the complaint or documents the complaint necessarily relies on and whose authenticity is not contested. Lee v. County of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001). In addition, the court may take judicial notice of facts that are not subject to reasonable dispute. Id. at 688 (discussing Fed. R. Evid. 201(b)). Allegations of fact in the complaint must be taken as true and construed in the light most favorable to the non-moving party. Spreewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). Pro se pleadings must be construed liberally on a defendant's motion to dismiss for failure to state a claim. Ortez v. Washington County Oregon, 88 F.3d 804, 807 (9th Cir. 1996).

B. Analysis

1. Defendant Ryan

The claims against Ryan were dismissed because they were respondeat superior claims. Plaintiff has amended to allege direct involvement by Ryan with the action against him, for instance alleging that Ryan was conferring in the hall with former defendant Bornstein when court action was being taken against him.

To the extent that plaintiff is not alleging liability on a respondeat superior theory, or presenting insufficient conclusory allegations of failure to train and supervise, see Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988), he is alleging liability based on actions taken to prosecute plaintiff for which defendant Ryan is absolutely immune, see Buckley v. Fitzsimmons, 509 U.S. 259, 272-73 (1993) (prosecutor performing advocate's role entitled to absolute immunity).

It should also be noted that plaintiff probably has named the wrong defendant. In ruling on a motion to dismiss, the court may take judicial notice of facts that are matters of public record. Lee v. County of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001)(discussing Fed. R. Evid. 201). It is a matter of public record that Ryan was not the United States Attorney in 1997-2001, when the events which gave rise to the complaint occurred. See http://www.usdoj.gov/usao/can/html/us_attorney_biography.html (visited Mar. 5, 2005)(Kevin Ryan appointed U.S. Attorney by President Bush on July 31, 2002). He thus could not have had a hand in them, nor in any of the alleged deficiencies of the United States Attorney's office which plaintiff believes caused him to be prosecuted.

Although plaintiff could amend to name as a defendant the person who was the United States Attorney at the time action was being taken against

him, doing so would be futile in that he has already been allowed to amend to allege any facts which would show the liability of the United States Attorney, whoever that may have been, and has failed to state a claim. These claims therefore will be dismissed without further leave to amend.

2. Chief Probation Officer Aamundstad

As to Aamundstad, plaintiff's allegations in his amended complaint are again conclusory ("failure to train and supervise"), based on respondeat superior, or, as in plaintiff's claims that Asmundastad [*sic*] was involved with Probation Officer Patterson in initiating the probation violation charges, involve functions functionally comparable to that of a prosecutor, for which she is immune. See Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003)(under recent Supreme Court opinions, immunity extends to at least persons performing functions of judges, prosecutors, trial witnesses, and jurors).

CONCLUSION

For the foregoing reasons, plaintiff's claims are DISMISSED with prejudice. The clerk shall close the file.

IT IS SO ORDERED.

DATED: March 8, 2005.

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
UNITED STATES DISTRICT JUDGE

APPENDIX C

FILED
MAR 08 2005
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

COY PHELPS,	)	No. C 02-2504 PJH (PR)
	)	
Plaintiff,	)	JUDGMENT
	)	
vs.	)	
	)	
MARILYN PATEL, et al.,	)	
	)	
Defendants.	)	
	)	

A judgment of dismissal with prejudice is entered in favor of defendants and against plaintiff. Plaintiff shall take nothing by way of his complaint.

IT IS SO ORDERED AND ADJUDGED.

DATED: March 8, 2005

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
UNITED STATES DISTRICT JUDGE

APPENDIX D

FILED
MAR 17 2006
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COY PHELPS

Plaintiff – Appellant

v.

MARILYN PATEL; et al.,

Defendants – Appellees.

No. 05-15578

D.C. No.
CV-02-02504-PJH

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Submitted March 8, 2006**

Before: CANBY, BEEZER, and KOZINSKI, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Federal prisoner Coy Phelps appeals pro se from the district court's judgment dismissing his Bivens action alleging that a federal judge, an assistant United States Attorney, the United States Attorney and two probation officers violated his civil rights. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, *Mullis v. United States Bankr. Court*, 828 F.2d 1385, 1388 (9th Cir. 1987), and we affirm.

The district court properly dismissed Phelps's claims against United States District Judge Patel as barred by judicial immunity. *See id.*

The district court also properly dismissed Phelps's claims against the United States Attorney and an assistant United States Attorney as barred by prosecutorial immunity. *See Imbler v. Pachtman*, 424 U.S. 409, 431 (1976).

Phelps's claims against the two probation officers are barred by quasi-judicial immunity. *See Demoran v. Witt*, 781 F.2d 155, 157-58 (9th Cir. 1986).

AFFIRMED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COY PHELPS — No. 05-15578

Plaintiff – Appellant — D.C. No. CV-02-02504-PJH

v.

JUDGMENT

MARILYN PATEL; et al.,

Defendants – Appellees.

Appeal from the United States Court for the Northern District of California (San Francisco).

This cause came on to be heard on the Transcript of the Record from the United States District for the Northern District of California (San Francisco) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED.**

Filed and entered 03/17/06